STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2003
v	No. 242789 Ingham Circuit Court
RICHARD ALAN LAWWILL, Defendant-Appellant.	LC No. 01-077923-FC

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317. The trial court sentenced defendant to 31 years and 4 months to 60 years in prison. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by the admission of autopsy photographs of the victim. We disagree. "The decision to admit or exclude photographs is within the sole discretion of the trial court," and "the proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995); MRE 403.

This Court has held that autopsy photographs are admissible where, as here, they are referred to during the forensic pathologist's testimony, and are instructive in depicting the nature and extent of the victim's injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Additionally, our Supreme Court has held that the burden of proof to exclude the possibility that a killing was done in self-defense rests on the prosecution. *People v Jackson*, 390 Mich 621, 626; 212 NW2d 918 (1973). Here, the autopsy photographs were properly used to refute defendant's theory of the case that the wounds were inflicted on the victim in self-defense. Our Supreme Court also has stated that "all elements of a criminal offense are 'in issue' when a defendant enters a plea of not guilty" and that "the prosecution must carry the burden of proving every element beyond a reasonable doubt." *Mills, supra* at 69-70. Here, defendant was charged with first-degree murder; therefore, his intent was a direct issue as an element of the charged offense. "[E]vidence of injury is admissible to show intent to kill," and the autopsy photographs were instructive in depicting the nature and extent of the victim's injury and were probative of the issue of intent. *Id*. at 71; *People v Howard*, 226 Mich App 528, 550; 575 NW2d 16 (1997).

Defendant also contends that the autopsy photographs should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice, in contravention of MRE 403. Here, we agree with the decision of the trial court that the admission of the autopsy photographs was "the least gruesome way of demonstrating the number of wounds and placement of the wounds on the decedent." Further, we are not persuaded that the record supports defendant's claim that the autopsy photographs were rendered inadmissible due to changes caused by intervening procedures of the medical examiner.

Defendant next argues that the trial court abused its discretion and denied him a fair trial in allowing the prosecution to cross-examine defendant's friend regarding defendant's prior convictions. We disagree. We review the trial court's admission of evidence for an abuse of discretion, which is only found when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

While the prosecution in a criminal trial is generally barred from the circumstantial use of bad character to prove that the defendant committed the crime charged, a criminal defendant may introduce evidence of his character to prove that he could not have committed the crime, pursuant to MRE 404(a)(1). *People v Whitfield*, 425 Mich 116, 129-130; 388 NW2d 206 (1986). Evidence of defendant's character may be presented in the form of opinion or reputation testimony, pursuant to MRE 405(a). *Id*. Here, during cross-examination of defendant's friend, defense counsel elicited testimony that defendant was an easygoing and peaceful person. "Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995).

In this case, after defendant admitted evidence of his easygoing and peaceful character, the prosecutor requested permission from the trial court to question defendant's friend about specific instances of violent crimes committed by defendant, pursuant to MRE 405(a), arguing that defendant opened the door to character evidence concerning his character trait for peacefulness. The trial court ruled that such evidence was admissible, and on rebuttal, the prosecution asked defendant's friend whether he was aware that defendant had been convicted of "menacing using" a deadly weapon in 1993, and of third-degree assault in 1995 and 1998. MRE 405(a) permits the prosecution's rebuttal to be done by cross-examining defense character witnesses concerning reports of specific instances of conduct. *Whitfield, supra* at 131. Therefore, the trial court did not abuse its discretion in allowing the prosecution to insert evidence of defendant's prior convictions to rebut the testimony of defendant's friend that defendant was an easygoing and peaceful person.

Defendant's characterization of the issue as whether the trial court impermissibly admitted the "bad act" evidence under MRE 404(b) is misplaced. *People v Lukity*, 460 Mich 484, 499; 596 NW2d 607 (1999). Here, the prosecutor did not attempt to introduce evidence that defendant had committed other crimes to prove that he acted in conformity with his character for violence in murdering the victim in the instant case. *Id*. Rather, he merely cross-examined defendant's friend regarding the crimes to rebut testimony as permitted by MRE 405(a), in response to the testimony, under MRE 404(a)(1), that defendant was an easygoing and peaceful person. *Id*. The prosecutor's cross-examination under MRE 405(a) simply did not implicate

MRE 404(b). *Id*. Moreover, the prosecutor was not obligated to demonstrate a purpose under which such evidence would be admissible, or provide notice, as required by MRE 404(b). *Id*.

Defendant next argues that he was denied a fair trial when the prosecutor improperly commented on his post-*Miranda*[1] silence. We disagree. We review issues of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, defendant failed to timely and specifically object to preserve this claim of prosecutorial misconduct for review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Accordingly, to avoid forfeiture under the plain error rule, defendant must demonstrate plain error which affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecutor asked the police officer who transported defendant from jail to another precinct whether defendant responded that he had been injured, and the officer responded that defendant indicated that his left side was sore. The prosecutor then asked the officer if defendant explained how he was injured, and the officer answered that defendant did not give an explanation. The prosecutor asked the police officer who transported defendant to the hospital to execute a search warrant for hair and nail samples if defendant told him about any injuries, and the officer responded that defendant did not mention that he was injured. On cross-examination of defendant, the prosecutor elicited testimony that defendant told the doctor at the hospital that one of his ribs was sore, but that he was unsure if he could share information with anyone until he spoke to a lawyer. Defendant additionally testified that he did not want to explain his injuries to anyone, including two other police officers, until he spoke with a lawyer.

It is well settled that "the use of a criminal defendant's silence 'at the time of arrest and after receiving *Miranda* warnings' for impeachment purposes" amounts to a due process violation. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001), quoting *Doyle v Ohio*, 462 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). However, contrary to defendant's assertion, the record does not support defendant's contention that his silence or non-responsive conduct occurred during a custodial interrogation situation, or that it was in reliance on the *Miranda* warnings. *People v Schollaert*, 194 Mich App 158, 166; 486 NW2d 312 (1992). Defendant's silence was therefore not a constitutionally protected silence. *Id*. Defendant has failed to demonstrate plain error affecting his substantial rights, and is not entitled to relief on this basis. *Carines, supra*.

Finally, defendant argues that the trial court erred in failing to instruct the jury that he had no duty to retreat in his own home, based on its factual determination that defendant was not a resident of the home. We disagree. We review jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *Id*. Additionally, we review a trial court's factual findings for clear error. *People v Everard*, 225 Mich App 455, 458; 571

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

NW2d 536 (1997); MCR 2.613(C). A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *Id*.

In the instant case, the trial court instructed the jury as to CJI2d 7.15, the general self-defense instruction, and CJI2d 7.20, the self-defense burden of proof instruction. However, the trial court determined that defendant was not a resident of the home, and consequently refused defendant's request to instruct the jury as to CJI2d 7.17, the self-defense instruction that there is no duty to retreat while in one's own dwelling. *People v Davis*, 216 Mich App 47, 54-55; 549 NW2d 1 (1996).

The trial court based its decision on the testimony of the person who rented the house where defendant was staying at the time of the incident. He testified that defendant had lived with him previously, but that he had since moved to Colorado and was merely visiting at the time of the incident. Further, defendant testified that he had been to Georgia visiting, was in Michigan visiting at the time of the incident, and that he had to be home in Colorado by Christmas. This Court has stated that "the determinative factor in cases involving the 'no retreat' rule is not property ownership, but rather the location where a person resides." *People v Fisher*, 166 Mich App 699, 712; 420 NW2d 858 (1988), rev'd after second remand on different grounds 442 Mich 560; 503 NW2d 50 (1993). The trial court characterized defendant as "an itinerate laborer of picking up some money along the way while he visited his sons and grandsons or sons and grandchildren who lived here in the state." We find no error in the trial court's determination that the evidence did not support a "no duty to retreat" instruction. *Davis, supra* at 55. Moreover, any error in failing to give this instruction was harmless because defendant's rights were adequately protected by the self-defense instruction given by the trial court. *Id*.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio